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No. 96-1799

In The

Supreme Court of the United States

October Term, 1996

GEORGE F. REIDY, TONI E. REIDY, TERRENCE M. REIDY, JOHN A. REIDY, BRIAN J. REIDY and GEORGE M. REIDY,

Petitioners,

vs.

TRAVELERS INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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331

QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Circuit Court of Appeals erred when it concluded that no material issue of fact existed regarding Petitioner George Reidy's failure to comply with the procedural prerequisites for bringing an action under the Massachusetts Fair Employment Practices Statute.

2. Whether the First Circuit Court of Appeals erred when it concluded that no competent evidence existed to establish that Petitioner George Reidy was not an employee at will.

3. Whether the First Circuit Court of Appeals erred when it found no material issue of facts regarding Petitioners' employment-related state tort claims.

RULE 29.6 STATEMENT

The following companies, subsidiaries and affiliates of Respondent Travelers Insurance Company have issued shares to the public:

Travelers Group, Inc.

Travelers Property Casualty Corp.

Smith Barney Mutual Funds Management, Inc.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Rule 29.6 Statement	ii
Table of Contents	iii
Table of Citations	iv
Statutory Provisions Involved	1
A. Procedural History	1
Misstatements In The Petition Regarding Petitioner's Compliance With The Procedural Requirements	2
Statement of the Case	5
Reasons for Denying the Writ	11
I. The Case Simply Does Not Present Any Legal Questions That Need To Be Resolved By The Supreme Court.	11
II. Petitioner's Breach Of Contract Claim Fails As A Matter Of Law.	12
III. Petitioner Failed To Comply With The Procedural Requirements Of M.G.L. Chapter 151B.	14

Contents

Page

IV. Petitioner's "Total Disability" Would Justify Summary Judgment On His Discrimination Claim. 16

V. Petitioners' Claims For Loss Of Consortium And Nurture Are Barred By M.G.L. Chapter 152, § 24. 20

Conclusion 22

TABLE OF CITATIONS

Cases Cited:

Agin v. Federal White Cement, Inc., 417 Mass. 669, 632 N.E. 2d 1197 (1994) 4

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 11

Andrews v. Arkwright Mutual Insurance Company, 423 Mass. 1021, 673 N.E. 2d 40 (1996) 15, 16

August v. Offices Unlimited, Inc., 981 F.2d 576 (1st Cir. 1992) 17, 18, 20

Beal v. Board of Selectmen of Hingham, 419 Mass. 535, 646 N.E. 2d 131 (1995) 16, 17, 18

Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass. 437, 646 N.E. 2d 111 (1995) 19

Contents

	Page
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	11
Charland v. Muzi Motors, Inc., 417 Mass. 580, 631 N.E. 2d 555 (Mass. 1994)	3, 4, 15
Cherella v. Phoenix Technologies, Ltd., 32 Mass. App. Ct. 919, 586 N.E. 2d 29 (1992)	14
Christo v. Edward G. Boyle Ins. Agency, Inc., 402 Mass. 815, 525 N.E. 2d 643 (1988)	14, 15
Clarke v. Kentucky Fried Chicken, 57 F.3d 21 (1st Cir. 1995)	21, 22
Cox v. New England Tel. & Tel. Co., 414 Mass. 375, 607 N.E. 2d 1035 (1993)	17, 19
EEOC v. Green, 76 F.3d 19 (1st Cir. 1996)	15
Doe v. Purity Supreme, Inc., 422 Mass. 563, 664 N.E. 2d 815 (1966)	4
Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E. 2d 690 (1980)	21
Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E. 2d 1251 (1977)	13
Garrity v. United Airlines, 42 Mass. 55, 653 N.E. 2d 173 (1995)	14

Contents

Page

Gram v. Liberty Mut. Ins. Co., 384 Mass. 659, 429 N.E. 2d 21 (1981) 13

Green v. Wyman-Gordon Co., 422 Mass. 551, 664 N.E. 2d 806 (1966) 4, 22

Guzman v. Lowinger, 422 Mass. 570, 664 N.E. 2d 820 (Mass. 1996) 4

Hamilton v. Baystate Medical Educ. & Research Foundation, Inc., 866 F. Supp. 51 (D. Mass. 1994) 14, 21

Jackson v. Action for Boston Community Development, 403 Mass. 8, 525 N.E. 2d 411 (1988) 12

Kolodziej v. Smith, 412 Mass. 215, 588 N.E. 2d 634 (1992) 12

Labonte v. Hutchins & Wheeler, 424 Mass. 813, 678 N.E. 2d 853 (1997) 17

Maddaloni v. Western Massachusetts Bus Lines, Inc., 386 Mass. 877, 438 N.E. 2d 351 (1982) 13

McDonnell Douglas Corporation v. Green, 411 U.S. 792, 92 S. Ct. 1917 (1973) 19

Mouradian v. General Electric Co., 23 Mass. App. Ct. 538, 503 N.E. 2d 1318 (1987) 22

Contents

	Page
O'Brien v. New England Telephone & Telegraph Co., 422 Mass. 686, 664 N.E. 2d 843 (1996)	12, 13
Pesterfield v. Tennessee Valley Auth., 941 F.2d 437 (6th Cir. 1991)	19
Smith Pfeffer v. Superintendent of the Walter E. Fernald State School, 404 Mass. 145, 533 N.E. 2d 1368 (1989)	13
St. Arnaud v. Chapdelaine Truck Center, Inc., 836 F. Supp. 41 (D. Mass. 1993)	21
St. Germaine v. Pendergast, 411 Mass. 615, 584 N.E. 2d 611 (1992)	21
Sereni v. Star Sportswear Mfg. Corp., 24 Mass. App. Ct. 428, 509 N.E. 2d 1203 (1987)	14
Wheelock College v. MCAD, 371 Mass. 130, 355 N.E. 2d 309 (1976)	19
Woods v. Friction Materials, Inc., 30 F.3d 255 (1st Cir. 1994)	4
Statutes Cited:	
M.G.L. ch. 93, § 102	4
M.G.L. ch. 93, § 103	4

Contents

Page

M.G.L. ch. 151B 4, 14, 15, 16, 18, 19

M.G.L. ch. 151B, § 1(16) 19

M.G.L. ch. 151B, § 5 1

M.G.L. ch. 151B, § 9 ..... 1, 4

M.G.L. ch. 152, § 24 20

APPENDIX

Appendix A — Letter to Mr. George F. Reidy from Luther E. Allen, Jr. of the Commonwealth of Massachusetts Commission Against Discrimination Dated September 20, 1991 ..... 1a

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions cited by the Petitioner, the Respondent adds:

> 1. M.G.L. ch. 151B, § 5: . . . Any complaint filed pursuant to this section must be so filed within six months after the alleged act of discrimination.
>
> 2. M.G.L. ch. 151, § 9: . . . Any person claiming to be aggrieved by a practice made unlawful under this chapter or under chapter one hundred and fifty-one C, or by any other unlawful practice within the jurisdiction of the commission, may, at the expiration of ninety days after the filing of a complaint with the commission, or sooner if a commissioner assents in writing, but not later than three years after the alleged unlawful practice occurred, bring a civil action for damages or injunctive relief or both in the superior or probate court for the county in which the alleged unlawful practice occurred or in the housing court within whose district the alleged unlawful practice occurred if the unlawful practice involves residential housing.

A. Procedural History

The district court, on June 3, 1996, as Petitioner asserts, did render summary judgment on all Petitioner's claims. As to the question of whether Petitioner filed a timely administrative charge with the state agency, the district court, for purposes of

the summary judgment motion, "assumed" that Petitioner had filed an administrative charge on August 30, 1991. It further found that Petitioner had still failed to comply with the procedural requirements for initiating a state civil action because Petitioner had neither waited ninety days before initiating the civil action nor obtained approval of the state anti-discrimination agency to proceed with a civil action before ninety days. The First Circuit Court did not reach the second procedural defect, finding that the record evidence made it clear that no timely charge of discrimination had been filed.

MISSTATEMENTS IN THE PETITION REGARDING PETITIONER'S COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS

Beyond excessive and unsupported hyperbole in the Statement of the Case, the Petition contains critical misstatements regarding several dispositive procedural matters that led to the summary judgment issued both by the First Circuit Court of Appeals and, on an alternative basis, by the district court. Thus, Petitioner asserts that he sent an administrative charge to the Massachusetts Commission Against Discrimination ("MCAD"), the Commonwealth's fair employment practices agency, on August 30, 1991, and that "[t]he MCAD sent back a form letter on September 20, 1991 *acknowledging receipt of the charge*." Pet. at 14-15 (emphasis added). In fact, while a letter was sent to Petitioner and his counsel by the MCAD on or about September 20, 1991, the letter stated just the opposite.[1]

Documents produced in discovery, and submitted both in support of and in opposition to the Motion for Summary Judgment, reflect a putative charge of discrimination, as well as an unsigned cover letter to the Massachusetts Commission Against Discrimination, dated August 30, 1991, on the letterhead

1. A copy of the letter is attached to this Opposition as Appendix A.

of Petitioner's counsel. The putative charge was not date-stamped and contained no docket number. There was a claim, but no record evidence, that the letter was ever sent.[2] Moreover, the aforementioned September 20, 1991 letter from the MCAD acknowledged receipt of a *letter* but specifically stated that if Petitioner wanted to pursue a claim of discrimination, its rules required that a "formal complaint be filed with the agency." Thus, not only was there no letter "*acknowledging receipt of the charge*" as the Petition alleges, the September 20 letter, as noted by the First Circuit Court, placed Petitioner and his counsel on notice that there had been no charge filed. The record also contains admissible evidence from the MCAD (as well as the Equal Employment Opportunity Commission) that they had no record of any charge of discrimination ever being filed by Petitioner, as well as evidence from Respondent that it was never served with any administrative charge of discrimination.

The Petition also *incorrectly* asserts that under the state law "A person who sends a charge of discrimination with the MCAD had the right to immediately withdraw the charge in order to file a private lawsuit in accordance with the Laws of Chapter 151B, § 9." Petition at 15. As is clear from the expressed language of the statute, there simply is no right to *immediately* pursue a lawsuit once a charge has been filed. Rather, the statute precludes the filing of a civil action until ninety days have passed since the filing of the charge, unless the MCAD has approved, in writing, an earlier filing. This procedure, which allows for the charge to be dealt with, in the first instance, by the state's anti-discrimination agency, has been recognized by the Commonwealth's Supreme Judicial Court. *Charland v. Muzi Motors, Inc.*, 417 Mass. 580, 584, 631 N.E. 2d 555, 557 (Mass.

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2. Thus, the record does not contain an affidavit from counsel or anyone in counsel's office stating, under oath, that the materials were submitted to the MCAD.

1994) (. . . under M.G.L. ch. 151B, § 9, a person claiming discrimination "may maintain a civil action only if she has previously filed a timely complaint with the [MCAD] and ninety days have passed (or a commissioner has assented to an earlier filing). As found by the district court, it was undisputed that even if the August 30, 1991 charge was filed with the MCAD, the instant civil action was commenced *before* the expiration of ninety days and *without* the specific approval of the MCAD.

Furthermore, the Complaint in the instant case alleged *age* discrimination under M.G.L. ch. 151B. Petitioner's handicap discrimination claim was brought under an entirely different statute, M.G.L. ch. 93, § 103. However, state law makes it clear that when, as here, discrimination claims would have been actionable under M.G.L. ch. 151B, there is no independent avenue of relief under the alternative statute or common law. *See Guzman v. Lowinger,* 422 Mass. 570, 664 N.E. 2d 820 (Mass. 1996) ("[W]here M.G.L. c. 151B applies, its procedural prerequisites may not be bypassed by reconstituting a sexual harassment claim as a violation of the civil rights act or the Massachusetts Equal Rights Act, M.G.L. c. 93, § 102 (1994 ed) or as a new common law claim."). *Green v. Wyman-Gordon Co.*, 422 Mass. 551, 555, 664 N.E. 2d 806, 811 (1966); *Doe v. Purity Supreme, Inc.*, 422 Mass. 563, 567, 664 N.E. 2d 815, 819 (1966) (refusing to create a common law exception to the exclusivity of the Workers' Compensation Act). The same rationale applies with equal force to Petitioner's handicap discrimination claim filed under M.G.L. ch. 93, § 103. *See also Charland v. Muzi Motors, Inc.*, 417 Mass. 580, 631 N.E. 2d 555 (Mass. 1994); *Agin v. Federal White Cement, Inc.*, 417 Mass. 669, 672, 632 N.E. 2d 1197 (1994). *See also Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994) (Chapter 151B was the exclusive remedy for state law employment discrimination complaints).

STATEMENT OF THE CASE

The principal Petitioner, George Reidy ("Petitioner" or "Reidy"), was born on July 20, 1941. In 1973, Petitioner became a unit supervisor in the Subrogation Unit.[3]

In 1983, Travelers closed its Springfield, Massachusetts office, and its workload was absorbed by the Worcester office. Reidy claimed that this development increased his workload and that the office was understaffed.

In 1985, John Honore became Petitioner's manager. Honore was older than Petitioner, and the two had a good working relationship between 1985-1987. However, when Honore did nothing to respond to Reidy's complaints regarding perceived understaffing, computer problems, and caseload, Reidy began to believe that Honore was perpetuating the alleged mistreatment to which Reidy had been subjected under his prior manager.

Honore was not satisfied with Petitioner's performance and had pointed out problems. In particular, while Petitioner was on vacation in 1987, Honore had reviewed numerous case files and noted that in many cases Reidy had let the statute of limitations run. Reidy was criticized by Honore for his oversight of these files, as well as for taking long and excessive coffee breaks, long lunches, and making personal phone calls.

Although Petitioner contends that the Subrogation Unit was intentionally understaffed in an effort to have him fail, thereby

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3. Petitioner and his supervisor disagreed about the quality of his work. Thus, in 1978, prior to Petitioner's reaching the age of forty and not suffering any disability, the supervisor placed Reidy on probation. In response, Reidy engaged an attorney who wrote the supervisor a letter, threatening a lawsuit against Smith personally if he persisted. The supervisor rescinded the probation.

seemingly justifying his termination, when Honore's displeasure with the unit reached a point that a change was to be made, Petitioner was *not* terminated. Rather, when in August of 1987, Reidy was removed as Subrogation Unit Head, he was made a claims representative within the Auto Damage Unit, while retaining his previous title and salary.

During the time Petitioner worked in the Auto Damage Unit, his new managers were likewise not satisfied with Reidy's ability to handle his cases and his slow-learning curve. Although, in retrospect, Petitioner believes that there was a nexus between his still unknown mental condition and his performance shortcomings, at the time Reidy never suggested to anyone at Travelers that he had a medical condition which interfered with his ability to perform his duties or which required any accommodation.

On or about June 1, 1988, Honore and Harold Miller, Assistant Manager in the Auto Damage Unit, advised Reidy that he had sixty days to improve his performance or face being placed on final warning. On or about August 17, 1988, Reidy was verbally informed that he was going to be placed on a final warning, which meant he would have to improve within the next sixty days or face termination.

While Reidy claims that one of the factors for Honore trying "to get him" was his age, he had no actual knowledge of employees being discriminated against because of age or handicap. There was absolutely no record evidence supporting any claim of a pattern of forcing out older workers.

Reidy was away from work on August 26 and 29, 1988 on vacation days, but he did not report to work on his scheduled date of return, August 30. In fact, he never again performed any work for Travelers *or sought* to return to his position. Rather, after several weeks of calling in sick, Reidy requested a medical

leave of absence and filed for disability benefits, claiming total disability. This request was granted, and Reidy was paid disability payments pursuant to Respondent's Sick Leave Plan, based on his total disability.

In August of 1989, Reidy began working as a courier for A & S Delivery Services. However, Reidy never informed Travelers that he was working.[4]

On or about November 5, 1990, Dr. Felsenfeld of Travelers advised Reidy that his doctor, Dr. Mario Moretti, had indicated that he was capable of light duty, and Reidy was asked to return to work on November 19, 1990. However, Reidy informed Respondent that he could *not* return to his prior position. According to Petitioner, while he requested that he be given a less stressful job, such as a courier position, he did *not* ask for an accommodation that would have allowed him to perform his own position. Moreover, contrary to the assertion in the Petition that "Travelers had other positions that he could perform" (Petition at 24), Petitioner admitted at deposition that the Worcester office did *not* employ any couriers and that he was not aware of any such vacancy anywhere in the company.

Travelers proposed that Reidy return to a modified position that was intended to eliminate as much stress as possible. Thus, to reduce stress, it was proposed that Petitioner return to the Subrogation Unit, where he would not have to deal directly with customers, and where he would be given a reduced workload of only seventy-five (75%) percent of the workload for a representative in that unit. However, Petitioner's physician, Dr. Moretti, determined that Reidy was not physically or mentally capable of handling the modified position.

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4. Petitioner asserts that he did tell Dr. Parenty, a physician performing an independent medical examination ("IME") on behalf of the Respondent, that he was working and "thought that he [Dr. Parenty] would tell them [Travelers]."

Under the terms of the disability plan, eligibility ceases when the employee "engages on a substantial basis in any occupation or employment for wage or profit." As a courier for A & S Delivery Services, Petitioner had been working between twenty-eight (28) and forty-five (45) hours per week for wages. Accordingly, on February 14, 1991, Travelers informed Reidy that it had recently learned that he was working as a courier, and that as a result, under the terms of the plan, his disability benefits would be discontinued as of March 4, 1991. Travelers notified Reidy that he would be placed on unpaid leave effective March 4, 1991, and his position would remain open for four weeks. If he did not report to work at such time, Travelers would assume that he had terminated employment.

By letter dated March 12, 1991, Travelers agreed to extend his sick leave benefits for an additional two weeks through March 22, 1991, "in order to allow him time to review the . . . [Sick Leave] Plan." In addition, the letter informed Reidy that his unpaid leave would now commence as of March 25, 1991, and extend for four weeks from that date. Should Reidy not return to work at the end of that period, Travelers would consider that he had terminated his employment.

In a confirmatory letter dated March 28, 1991, Travelers again informed Reidy that because he had not returned to work by March 25, 1991, as outlined in the March 12, 1991 letter, Reidy's disability benefits had been discontinued pursuant to the express terms of the plan, as he was working for wage or profit. The letter also noted that he would be placed on unpaid leave for four weeks and that if he did not return at that time, he would be terminated.

On April 13, 1991, Reidy requested that his unpaid leave be extended to June 1, 1991. His request was allowed. Throughout this period, Reidy was given the opportunity to

return from leave, but could not or would not do so. Therefore, on June 1, 1991, his employment was terminated. The courier position itself proved too much for Reidy, and he quit that position shortly thereafter.

On or about October 10, 1991, Petitioner commenced this action against Travelers. Reidy also initiated a claim for Workers' Compensation benefits. On May 25, 1995, Judge Solomon issued a decision in the Workers' Compensation case. She found that his "emotional condition renders him incapacitated for any gainful employment" and that the incapacity was work related and compensable. She concluded that:

> the Employee is incapable of functioning in a work environment. I further find the Employee's incapacity to be total, with the exception of that period during which the employee attempted to work in a non-stressful situation.

The payments Petitioner is receiving pursuant to the decision of Judge Solomon *exceed* that which he would have received had his disability benefits not been terminated.

During his employment, Reidy received an employee handbook. The applicable Travelers' Employee Handbook states as follows:

> The Employee Handbook is designed to familiarize you with The Travelers' current personnel policy guidelines. It is a summary of guidelines for informational purposes only and should not be considered in any way as creating any rights, contract or guarantee of employment, of benefits, or of working

conditions between the employee and the company. At any time the company may change, supplement, or discontinue these guidelines.

The Travelers has a longstanding history of good employee relations, and the guidelines described in this handbook are intended to continue that tradition. At the same time, just as you have the right to leave your job here at the Travelers if you want to, for any reason at all or for no reason, and with or without advance notice, the company retains the same right as to termination of your employment. Thus, no Travelers manager or other person at the company has the authority to make a commitment of guaranteed or continuing employment to you, and no Travelers publication should be understood to make any such guarantee.

* * *

Both you and The Travelers are free to terminate your employment at any time, for any or no reason, and with or without advance notice.

REASONS FOR DENYING THE WRIT

I.

THE CASE SIMPLY DOES NOT PRESENT ANY LEGAL QUESTIONS THAT NEED TO BE RESOLVED BY THE SUPREME COURT.

It is obvious that this case presents no federal question whatsoever. It was brought, and decided, solely based upon state law. There is no conflict with any other circuit court decision or federal statute or constitutional provision that needs to be interpreted.

The decision is of no precedential value, as is reflected in the fact that the decision of the First Circuit Court of Appeals is an *unpublished* decision. Furthermore, the decision is fact specific, turning on the review of the admissible record evidence presented to the motion judge, a review more appropriately left to lower courts.

Moreover, the First Circuit and, utilizing an alternative theory, the district court, properly applied the state law of the Commonwealth of Massachusetts, carefully reviewed the record evidence, and properly decided that there were no "specific facts showing there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). There is no reason to grant certiorari.

II.

PETITIONER'S BREACH OF CONTRACT CLAIM FAILS AS A MATTER OF LAW.

The general rule in Massachusetts is set forth in *Jackson v. Action for Boston Community Development*, 403 Mass. 8, 9, 525 N.E. 2d 411 (1988):

> [W]here an employment contract, whether express or implied, contains no definite period of employment, it establishes employment at will . . . Employment at will is terminable by either the employee or the employer without notice for almost any reason or for no reason at all.

Accord, Kolodziej v. Smith, 412 Mass. 215, 221-222, 588 N.E. 2d 634 (1992). Contrary to assertions in the Petition, Reidy admitted at deposition that nothing bound him to remain with the company for a fixed period of time, nor did Travelers make any guarantees to him that he would be employed for a fixed period of time. He was not told that he would only be discharged for just cause.

While Respondent had an employment manual, the manual could not be construed to create anything other than an at-will relationship. Thus, under Massachusetts law, the manual's expressed retention of the right to unilaterally change the manual weighs against its being part of an employment contract.[5]

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5. *Compare O'Brien v. New England Telephone & Telegraph Co.*, 422 Mass. 686, 664 N.E. 2d 843 (1996), where the Massachusetts Supreme Judicial Court held that an implied contract of employment had been created based on the company's personnel manual because, unlike Travelers, the company did not reserve the right to unilaterally change the provisions of the manual or discharge any employee without cause.

Moreover, even if the terms of the handbook were deemed part of his employment contract, it does not assist Petitioner, since it provides specifically that "[b]oth you and The Travelers are free to terminate your employment at any time, for any or for no reason, and with or without advance notice." A contract that "reserve[s] to the parties an explicit power to terminate without cause on written notice" is a "classic terminable at will employment contract." *Fortune v. National Cash Register Co.*, 373 Mass. 96, 101, 364 N.E. 2d 1251 (1977). While Petitioner cites *O'Brien v. New England Telephone & Telegraph Co.*, 422 Mass. 686 (1996) to buttress his claim, in light of what was actually conveyed by the expressed language of this manual, that case does not support his position. Indeed, in *O'Brien* the Supreme Judicial Court noted, "[o]f course, the provisions of a personnel manual on analysis may grant no rights." *O'Brien*, *supra*, at 848. Thus, the manual here not only established that Reidy was an employee at will, it also expressly states that no individual manager had authority to alter that relationship.

Massachusetts courts have repeatedly declined to create an implied just cause requirement.[6] *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. 659, 671, 429 N.E. 2d 21 (1981); *Smith Pfeffer v. Superintendent of the Walter E. Fernald State School*, 404 Mass. 145, 150, 533 N.E. 2d 1368, 1371 (1989). There simply was no evidence submitted, which, even if credited, would have overcome the presumption that Petitioner remained an employee

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6. Under Massachusetts law, a breach of the implied covenant of good faith and fair dealing exists when the discharge of an at-will employee deprives that employee of compensation earned *prior to* the discharge. *Fortune v. National Cash Register Co.*, 373 Mass. 96, 101, 364 N.E. 2d 1251 (1977); *Gram v. Liberty Mutual Ins. Co.*, 384 Mass. 659 (1981) (Gram I); *Maddaloni v. Western Massachusetts Bus Lines, Inc.*, 386 Mass. 877, 438 N.E. 2d 351 (1982). There is no claim here that Petitioner was not paid, in full, for work he performed.

at will, subject to termination at any time for virtually any reason.[7]

III.

PETITIONER FAILED TO COMPLY WITH THE PROCEDURAL REQUIREMENTS OF M.G.L. CHAPTER 151B.

The comprehensive administrative scheme as set forth in M.G.L. ch. 151B requires that *all* claims regarding employment, *including discrimination*, be filed with the Massachusetts Commission Against Discrimination ("MCAD") *before* a complainant may seek access to the court. *Sereni v. Star Sportswear Mfg. Corp.*, 24 Mass. App. Ct. 428, 430, 509 N.E. 2d 1203 (1987); *Cherella v. Phoenix Technologies, Ltd.*, 32 Mass. App. Ct. 919, 920-921, 586 N.E. 2d 29 (1992); *Christo v. Edward*

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7. Furthermore, even if Petitioner had an implied employment contract, summary judgment was appropriate when the facts show that the Petitioner could not reasonably expect to prove that his termination was without just cause. *Garrity v. United Airlines*, 42 Mass. 55, 63, 653 N.E. 2d 173, 178 (1995). Under Massachusetts Law:

> absent contractual definition in the context of the contract, "just cause" means an employer can discharge an employee if [T]here existed (1) a reasonable basis for employer dissatisfaction with a[n] . . . employee, entertained in good faith, for reasons such as lack of capacity or diligence, failure to conform to usual standards of conduct, or other culpable or inappropriate behavior, or (2) grounds for discharge reasonably related, in the employer's honest judgment, to the needs of his business.

Hamilton v. Baystate Medical Educ. and Research Foundation, Inc., 866 F. Supp. 51, 55 (D. Mass. 1994).

G. Boyle Ins. Agency, Inc., 402 Mass. 815, 817, 525 N.E. 2d 643 (1988); *Charland v. Muzi Motors, Inc.*, 417 Mass. 580, 631 N.E. 2d 555 (Mass. 1994).

This proposition was reaffirmed by the decision of the Supreme Judicial Court, during the pendency of this appeal, in *Andrews v. Arkwright Mutual Insurance Company*, 423 Mass. 1021, 673 N.E. 2d 40 (1996), wherein the court dismissed a civil action because the plaintiff had filed an inquiry letter, but not a formal charge of discrimination, with the MCAD. Petitioner asserts *Arkwright* is distinguishable because here a charge was filed. The record simply did not support that claim. Rather, as earlier noted, in the instant case the record reflects that the agency itself, following a due and diligent search, found no evidence of any charge ever being filed.[8] The Respondent was never served with any charge of discrimination prior to the initiation of this action. There was no administrative investigation or conciliation process prior to litigation. The Petitioner took no action after being informed by the MCAD that he would need to file a formal charge for the agency to act. Under these circumstances, the Petitioner has simply not produced a sufficient quantum of evidence that would allow a reasonable factfinder to conclude that a charge of discrimination had been filed with the MCAD, and the First Circuit properly concluded that Petitioner's claim under M.G.L. ch. 151B was barred.

Furthermore, even assuming, *arguendo*, that a charge of discrimination was filed on or about August 30, 1991, as the district court properly found, summary judgment was appropriate because the instant action was filed within ninety

8. *Contrast EEOC v. Green*, 76 F.3d 19 (1st Cir. 1996) (the *parties'* competing affidavits regarding whether a charge of discrimination had been filed created a genuine issue of material fact precluding summary judgment.). In this case, the sworn testimony of officials from the EEOC and the MCAD demonstrate that a charge was never filed at either agency.

days of the filing of that charge, and without the authorization of the MCAD, contrary to the requirements of the statute. This court should not take jurisdiction when there are two alternative fatal procedural defects to Petitioner's pursuit of the action, caused solely by Petitioner's conduct.[9]

IV.

PETITIONER'S "TOTAL DISABILITY" WOULD JUSTIFY SUMMARY JUDGMENT ON HIS DISCRIMINATION CLAIM.

Even if not doomed by multiple procedural defects, summary judgment would have been appropriate. The undisputed facts demonstrate that since September 1988, almost three years before his termination, Petitioner was unable to perform the essential duties of his job. This is clear, based upon Petitioner's request for medical leave, his attendant statements, his application for and receipt of disability benefits from 1988 through 1991, Petitioner's declining to return to work even to a substantially modified, lower stress job, the medical documentation produced by his own physicians, and his deposition testimony. These facts show that he could not do his job and establish that Petitioner is not a qualified handicapped individual within the meaning of M.G.L. ch. 151B. *Beal v. Board of Selectmen of Hingham*, 419 Mass. 535, 646 N.E. 2d 131, 137

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9. The Petitioner continues to blame the agency, although there is no explanation for his failure to file (or refile if he had) a charge when the MCAD indicated that a formal charge was necessary. Nor can the MCAD be blamed for the Petitioner's filing of a civil suit prior to ninety (90) days from the alleged filing. There is no evidence he had even requested permission from the MCAD to proceed to file a civil suit within the ninety-day period, as required. As under federal law, under state law constructive knowledge of all procedural requirements is imputed to a plaintiff who retains counsel. *Andrews v. Arkwright Mut. Ins. Co., Inc., supra.*

(1995); *Cox v. New England Tel. & Tel. Co.*, 414 Mass. 375, 381-384, 607 N.E. 2d 1035 (1993); *August v. Offices Unlimited, Inc.*, 981 F.2d 576, at 587 (1st Cir. 1992).[10] Petitioner sought and received benefits for total disability beginning in 1988 and continuing thereafter. The recently-decided case, *Labonte v. Hutchins & Wheeler*, 424 Mass. 813, 678 N.E. 2d 853 (1997), while finding that the receipt of disability pay in that case did not preclude recovery, reinforces the proposition that an individual who, like Petitioner, claims and receives benefits because he is "totally disabled" is not a qualified handicapped employee. The court upheld the determination of discrimination determining that the jury could find, based upon a variety of facts, that the Petitioner was not claiming to be totally disabled, just that he needed an accommodation to perform his own job.[11] The court contrasted this to the factual situation in *August v. Offices Unlimited, Inc.*, 981 F.2d 576, at 587 (1st Cir. 1992) where the claim was for "total disability," barring a potential finding that the employee was nevertheless a qualified handicapped employee. The Supreme Judicial Court noted:

> A distinction from *Beal v. Selectmen of Hingham*, 419 Mass. 535 (1995), and *August*

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10. Petitioner sought and received disability payments first under the Travelers' Disability Plan, beginning in 1988, and later under the Workers' Compensation Act.

11. The court noted that "there was evidence to show that the plaintiff was capable of working a fifty-five hour week when allowed to utilize a flexible schedule and when his expected amount of walking was limited," and that the essential functions of that job could be performed within that schedule. It further noted that "[O]n the form on which the plaintiff filed his claim for benefits, he stated that he was in need of a flexible work schedule. This request for accommodation, never considered by the law firm, was evidence that the plaintiff *was not claiming to be totally disabled.*" *Id.* (emphasis added).

> *v. Offices Unlimited, Inc.*, 981 F.2d 576 (1st Cir. 1992), is that plaintiffs who eliminate a disputable issue of fact by claiming total disability may lose the fight to pursue a discrimination claim. See *Leatherwood v. United Parcel Serv.*, 708 S.W. 2d 396 (Tenn. Ct. App. 1985); *Grauer v. Occidental Life Ins. Co.*, 363 So. 2d 583 (Fla. Dist. Ct. App. 1978).

Id. at n. 8.

The present case is almost identical to *August* and *Beal*, both cases decided under M.G.L. ch. 151B. Like the plaintiffs in those cases, Reidy claims that he is a handicapped person and that Travelers discriminated against him because of that handicap when it terminated him. However, Reidy's statements attesting to his disabled condition, accompanied by the confirming reports of his several doctors, leave no doubt that Reidy is a "totally disabled person."[12] As a totally disabled person, Reidy would be unable to establish an essential element of his handicap discrimination claim, *i.e.*, that he is capable of performing the essential functions of his job with reasonable accommodation to his handicap.

Reidy's incapacity to perform any work also is dispositive of any claim that the 1991 termination was unlawful due to age. Since Petitioner was not capable of working in 1991, and was not performing his job to his employer's satisfaction when he

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12. In her award of total disability Workers' Compensation benefits, Judge Dianne L. Solomon, Administrative Judge of the Department of Industrial Accidents held: "I adopt the medical opinions of Doctors Moretti, Weiss, and Polizoti and find that the employee is incapable of functioning in a work environment. I further find the employee's incapacity to be total, with the exception of that period during which the employee attempted to return to work in a non-stressful environment."

was discharged for not returning to work, he cannot even meet the minimum burden of establishing a *prima facie* case under M.G.L. ch. 151B. *Wheelock College v. MCAD*, 371 Mass. 130, 355 N.E. 2d 309 (1976), adopting *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 92 S. Ct. 1917 (1973). Furthermore, in spite of Reidy's age, Respondent clearly sought to have Petitioner return to his position, and discharged him only when it was clear he would, or could not.[13] If the former, Petitioner simply abandoned his position. If the latter, Petitioner was not a qualified handicapped individual.[14] M.G.L. ch. 151B, § 1(16); *Cox v. New England Tel. & Tel. Co.*, 414 Mass. 375, 381-384, 607 N.E. 2d 1035 (1993).

The only request for accommodation, coming at the end of his employment, was a request for a "stress free" environment. An employer is not obligated, and likely cannot, create a stress-free environment for the employee suffering from an emotional disorder. *See Pesterfield v. Tennessee Valley Auth.*, 941 F.2d 437, 442 (6th Cir. 1991) (employer not required to provide a "stress-free environment" or immunize employee from legitimate, job-related criticism). Employers:

> are not required to find another job for an

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13. Petitioner strenuously argues for application of the summary judgment standard established by the Massachusetts Supreme Judicial Court in *Blare v. Husky Injection Molding Systems Boston, Inc.*, 419 Mass. 437, 646 N.E. 2d 111 (1995), and claims that it was not followed. However, neither the district court nor the circuit court applied a "pretext plus" standard. Petitioner has not pointed to any evidence that would allow for the conclusion that Respondent's articulated reason for terminating Petitioner, his inability to work, was a pretext.

14. Petitioner has never identified any accommodation that would have allowed him to return to his position in 1991. Rather, Petitioner admitted and the district court properly held that there was no reasonable accommodation that would have enabled Petitioner to perform his job.

> employee who is not qualified for the job he or she was doing. *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 289 n. 19, 107 S. Ct. 1123, 1131 n. 19, 94 L. Ed. 2d 307 (1987). Employers are only required not to deny an employee alternative employment opportunities reasonably available under the employer's existing policies.

August v. Offices Unlimited, Inc., 981 F.2d 576, at 587 (1st Cir. 1992). Contrary to his bald assertions, Petitioner produced no evidence that Respondent, which was in the midst of large-scale downsizing, had vacancies in positions that Petitioner could perform, or that he was denied the opportunity to transfer, pursuant to the employer's policies, based upon his handicap or age. Accordingly, the termination of Petitioner's employment nearly three years after he ceased being able to perform his job was not unlawful discrimination. Summary judgment would be justified on the merits as well as the procedure.

V.

PETITIONERS' CLAIMS FOR LOSS OF CONSORTIUM AND NURTURE ARE BARRED BY M.G.L. CHAPTER 152, § 24.

Petitioners'[15] continued claim for loss of consortium and support fly in the face of clear statute and findings of the courts of the Commonwealth. Petitioners' claims for loss of consortium and loss of nurture are barred by M.G.L. ch. 152, § 24, the exclusive remedy of the Workers' Compensation Act. This section states that if an employee fails to notify his employer by writing, at the time of his contract of hire, that he reserves

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15. The tort claims are brought by Reidy's spouse and children.

his right of action at common law with respect to an injury compensable under said chapter, then the law deems that *the employee has waived that right.* The section further provides that if the employee has waived his right of action at common law, then the employee's

> spouse, children, parents and any other member of the employee's family or next of kin who is wholly or partly dependent upon the earnings of such employee at the time of injury . . . *shall also be held to have waived any right* created by statute, at common law . . . against such employer, including, but not limited to . . . loss of consortium, parental guidance. . . .

(Emphasis added.) *See St. Germaine v. Pendergast*, 411 Mass. 615, 584 N.E. 2d 611 (1992) (the claims of spouses, children, and parents are equally barred by "exclusive remedy" of Workers' Compensation Act); *St. Arnaud v. Chapdelaine Truck Center, Inc.*, 836 F. Supp. 41 (D. Mass. 1993) (Workers' Compensation Act barred spouse's claim for loss of consortium); *Hamilton v. Baystate Medical Educ. & Research Foundation, Inc.*, 866 F. Supp. 51 (D. Mass. 1994) (loss of consortium claim is precluded by exclusive remedy section of state Workers' Compensation Act).

Indeed, in response to the *Ferriter v. Daniel O'Connell's Sons, Inc.*, 381 Mass. 507, 413 N.E. 2d 690 (1980) decision cited by Petitioner, the Legislature for the Commonwealth amended in 1985 the exclusivity provisions to bar consortium and support claims, as well as other employment tort claims. Courts have been unwilling to allow the circumvention of the Legislature's 1985 amendments expanding the employer's protections against tort claims by employees. *See Clarke v.*

Kentucky Fried Chicken, 57 F.3d 21 (1st Cir. 1995). More recently, the Supreme Judicial Court, based on similar reasoning, has found common law claims arising out of sexual harassment to be barred by the exclusivity provisions of the Workers' Compensation Act. *Green v. Wyman Gordon Company*, *supra*. The circuit court did not err when it did not allow claims by the family of this Petitioner, in direct contravention of the statutory mandate.

Furthermore, the Massachusetts courts have determined that discriminatory termination is not the type of tort against a spouse that would even allow for recovery of consortium or loss of nurture claims. *See Mouradian v. General Electric Co.*, 23 Mass. App. Ct. 538, 503 N.E. 2d 1318, 1321 (1987) (dismissing consortium claim in employment discrimination case where no valid tort claim existed). Thus, both the district court and the circuit court were correct in dismissing these claims for the alternative reason that, even if not barred by the exclusivity provisions of the Workers' Compensation Act, there has been no tort against George Reidy that would support an independent claim of consortium and loss of nurture by his family.

CONCLUSION

For all of the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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APPENDIX A — LETTER TO MR. GEORGE F. REIDY FROM LUTHER E. ALLEN, JR. OF THE COMMONWEALTH OF MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION DATED SEPTEMBER 20, 1991

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION
1 ASHBURTON PLACE, BOSTON 02108

Administrative Services: 727-3990
September 20, 1991

Mr. George F. Reidy
46 Browing Road
Shrewsbury, MA 01545

RE: Reidy v. The Travelers Companies

Thank you for your letter outlining your allegations of discrimination. This information may prove very useful in helping the Commission to understand your claim.

However, the Commission's rules require that you must file a formal complaint in order for us to have the power to act further on your claim. Before we can take your complaint and begin an investigation, a Commission representative needs to meet with you to discuss your situation further.

To discuss your case, come to the Commission's office at any time Monday through Friday, from 9:00 a.m. to 4:30 p.m. Enclosed you will find a brochure that will explain to you how the procedures at the Commission work.

I look forward to meeting you, and hope that I can be of some service to you.

Sincerely,

s/ Luther E. Allen, Jr.
Luther E. Allen, Jr.
Compliance Officer

cc: Frederick T. Golder, Esquire
Bernstein, Golder & Miller P.A.
230 Broadway — Suite 103
Lynnfield, MA 01940-2383